Department of Law Monthly Report
April, 2006

Generally Speaking

Comings and Goings

AAG **Laura Bowen** transferred from the Anchorage Child Protection section to the Collections & Support section.

Sheila Bugbee has resigned from the Administrative Services Division. She transferred to the Department of Administration, Division of Personnel.

AAG **Alicia Porter** in the Fairbanks AGO resigned. She joined the Anchorage law firm of Landye Bennett Blumstein.

Lynn Concepcion joined the Anchorage AGO. Lynn will be splitting her time as a litigation assistant between the Labor and State Affairs and the Opinions, Appeals, and Ethics sections.

In This Issue

Civil Division

Child Protection

CINA Cases

The section received a number of new CINA cases. Based on the allegations in the OCS petitions, substance abuse was the most common concern.

Several newborns and a toddler tested positive for drugs. Subsequently OCS took the children into custody.

In one such case, a newborn tested positive for amphetamines. The mother refused to allow the child to room with her and did not appear to be trying to bond with the child. OCS has a history with both parents involving methamphetamine abuse. The child's father is in jail on drug and weapons violations after a California narcotics conviction.

OCS took custody of another newborn that tested positive for cocaine and had numerous medical complications. The mother acknowledged using cocaine every day and also admitted the use of methamphetamine during her pregnancy. Three of her older children had also been removed by the state.

After having removed a two-year-old child from the mother due to drug use when the mother was seven months pregnant, OCS next assumed custody of her newborn. OCS has concerns about both parents' drug use.

In another case, a mother brought her three-year-old child to the emergency room because he was vomiting and having seizures. The child tested positive for cocaine. The mother admitted she had recently relapsed on cocaine and alcohol.

The mother was arrested for child neglect. OCS has a significant prior history with this family.

Three young children were taken into custody after a newborn and the mother tested positive for cocaine. The mother acknowledged repeated cocaine use just prior to the birth. The mother's last child had been born under similar circumstances. According to an anonymous caller, the mother had claimed that her boyfriend had sexually abused the younger siblings, but she continued to live with that man along with her young children.

In another case, OCS and APD investigated a couple who were allegedly using drugs in the home around their one-year-old child. They found crack cocaine paraphernalia, empty beer containers, smoking pipes, and other items dangerous to a young child. Both parents admitted to using crack cocaine. While OCS was in the process of attempting to take custody of the child, the mother absconded with the child. Her whereabouts and those of the child were unknown when OCS filed its petition.

In other cases, OCS was forced to remove children from their homes after social workers' attempts to assist parents to care properly for the children failed. In one instance, OCS was concerned about a family because they were being evicted, and the parents had a history of DV and drug use. When the social worker arrived at the home to investigate, he found the mother was not sober enough to care for her children. The social worker convened a Team Decision Making meeting in order to determine if there was a way to make the children safe other than by removing them from the home, but the mother did not appear for the meeting.

OCS provided extensive services to a family where the concern was unsanitary conditions in the home that affected the safety of the children. Despite active efforts to keep the children in the home and help remedy the conduct of the parents, OCS decided the children needed to be removed.

OCS social workers also attempted to work with a mother with a significant substance abuse problem. However, after repeatedly testing positive for illegal substances, the mother agreed to voluntarily place her child with a relative. The mother also has significant mental health issues.

In another case, substance abuse caused OCS to take two children ages 13 and 17 into custody after their mother and the fathers of both of the children died within three years of each other, all from drug or alcohol overdoses.

Commercial and Fair Business

Consumer Protection/Anti-Trust

Yellow Pages, Inc. Multi-State Settlement. Alaska, along with 27 other states, entered into a settlement agreement with Yellow Pages, Inc. ("YPI") resolving allegations that YPI engaged in unfair or deceptive acts or practices in violation of each state's respective consumer protection acts relating to the solicitation checks and renewal notices sent to business consumers.

Alaska's complaint, filed in superior court, alleges that YPI engaged in misleading or deceptive conduct by sending out "live" checks to small businesses and other organizations which looked like rebate checks from local yellow pages companies, but which, when deposited by the consumer, purported to create a contract for advertising services for which the consumer owed YPI $179.00.

Under the settlement, injunctive relief was entered against YPI prohibiting YPI from sending live check solicitations into the state or attempting to collect on checks which were cashed by consumers. YPI is also required to pay refunds to consumers harmed by the conduct and pay the states $535,000 for costs, attorney fees, and consumer protection enforcement.

Division of Corporations, Business and Professional Licensing

Hearings

Hearing Held on Sixth RN License Application. AAG Gayle Horetski represented the Division of Corporations, Business and Professional Licensing (formerly the Division of Occupational Licensing) in an administrative hearing challenging the Board of Nursing's denial of Rene Kimble's most recent application for licensure as a registered nurse.

Kimble originally applied for a RN license in 1992. She falsified much of her license application, claiming work experience and education that she did not have, leaving out jobs from which she had been fired, forging a reference from and the signature of a former employer, etc. She also made numerous false statements in an employment application to Providence Hospital. Based upon Kimble's false statements to the board and the hospital, the board denied the license application. The license denial was sustained in the superior court and the Alaska Supreme Court on appeal.

Kimble has applied for licensure as an RN four more times. Those applications were denied by the board because Kimble had attempted to obtain a license by "fraud, deceit, or intentional misrepresentation" in 1992. Kimble's challenges to the board's denials of her applications were unsuccessful in the state superior court, the U.S. District Court, and the U.S. Court of Appeals, as were her efforts to obtain an injunction against the board.

In December 2005, the board denied yet another RN license application from Kimble (her sixth). An administrative hearing was held regarding this denial on April 25th before Administrative Law Judge Christopher Kennedy, who will issue a proposed decision to the board.

Decisions

In re Dr. Ness. ALJ David Stebing issued a proposed decision in a license discipline matter involving Anchorage dentist, Dr. Douglas Ness. The division took action against Dr. Ness based on a surgical procedure he performed on a patient that resulted in serious complications and damage to his patient. The division alleged that his dentistry efforts with respect to this patient did not meet minimum professional standards and were unethical in violation of state law.

A hearing took place over a period of six days in September 2005. The ALJ found that the division had proved its case and recommended the following sanctions: 1) that Dr. Ness be suspended from the practice of dentistry for four months; 2) that he pay a combined fine of $20,000, with $5,000 suspended; 3) that he participate in continuing education for eight hours on ethics before resuming active practice; and 4) that his license be subject to probation for a period of five years after the preceding conditions are fulfilled during which his office records will be subject to random audit by the board. The proposed decision will be submitted to the Board of Dental Examiners for approval. AAG Karen Hawkins represented the division in this matter.

Environmental

GC-2 Crude Oil Transit Line Spill. The section has been assisting DEC concerning the emergency response and investigation of the large crude oil spill from BP's GC-2 transit pipeline at Prudhoe Bay. Senior AAG Breck Tostevin drafted a DEC administrative subpoena to BP to preserve and produce documents concerning the spill and inspection, monitoring and maintenance concerning the line. Both Tostevin and Chief AAG Steve Mulder have provided support to DEC as well as the attorney general concerning the incident and the Office of Pipeline Safety Order issued in the aftermath of the spill.

APDES Primacy. The Department of Law and DEC continue to work on finalizing the state's

application to the EPA to assume permitting and enforcement primacy over point source discharges in the state, pursuant to the Clean Water Act. The application is due no later than June 30, 2006. Public comment has closed on the draft APDES regulations, and the agencies are reviewing the comments and finalizing regulations, as well as the program description and attorney general opinion for the application package. AAGs Cam Leonard, Ruth Hamilton Heese and Lindsay Wolter have been assigned to work on this matter.

SEACC's Lawsuit on the Kensington Mine Project. The State of Alaska has moved to intervene in SEACC's (and other environmental groups') revived federal district court challenge to the Kensington Mine Project, following the U.S. Army Corps of Engineers' re-issuance of the 404 permits for the Project. SEACC claims that the CWA Act prohibits the disposal of tailings to Lower Slate Lake, and SEACC's basic premise is that established effluent limits must apply to the placement of the tailings in lake, a premise that the state and other parties to the case vigorously dispute. AAGs Cam Leonard and Ruth Hamilton Heese have been assigned to work on this litigation.

Human Services

Litigation

Certificate of Need

Banner Health. The section is currently litigating a preliminary injunction motion related to the decision of the DHSS commissioner that Alaska Open Imaging Center did not require a CON. The motion is fully briefed and oral argument is anticipated in May.

Medicaid

Bayless, Snyder, Krone/Pierce, Solksi, Longenecker. All of these matters are progressing through motion practice and discovery. Motions to dismiss will be filed in the Longenecker and Solski matters. The section is hopeful that the Snyder matter can be resolved without any further litigation.

Public Assistance

Oukely. Briefing has been completed on whether those individuals who we know are presumptively ineligible for Social Security should be included in the class. The state argued they should not be paid Interim Assistance because it is against public policy to award benefits to individuals who are known not to be eligible. Oral argument was anticipated on this motion, but none was scheduled. We are awaiting the judge's decision.

Other

DLC v. API. The section is working with the Disability Law Center on issues related to their investigation of API. It is anticipated that the matter will be dismissed within the month of May.

Aid to Agency – Medicaid

The majority of the section's work on the Medicaid side revolves around the litigation mentioned previously. Chief AAG Stacie Kraly is currently working closely with DHSS on two contentious issues. One relates to Durable Medical Equipment and how the department reimburses for those services; the other relates to implementing a long-term care study that was commissioned by the department and which raised a number of issues that should be looked at related to the administration of the waiver programs. Each has the potential for litigation so the department is closely involved in those discussions.

Subrogation/Liens

April 2006 collections to date total $69,148.96. The foregoing amount is the result of 15 case resolutions. During April AAG Tim Twomey closed 46 matters total, either after a recovery of

money (15 matters) or after a determination that no third-party liability recovery/Medicaid reimbursement was possible or appropriate. Forty two new files were opened during April.

At the time of reporting, there was a case inventory of 520 open matters and 280 resolved matters. In addition to the amount collected during April, Twomey is expecting payment of approximately $25K for additional matters now resolved and anticipates a collection of approximately $75K in connection with one mediated matter, not yet confirmed.

For calendar year 2006 to date, Twomey has collected a total of $779,315.56. This compares with calendar year 2005, when collections for the year were $1,022,577.93

Medicaid Audits

AAG Rebecca Polizzotto completed her first administrative hearing related to the SB 41 provider audits. In *Hidden Heights*, the state is seeking to recoup Medicaid overpayments in the amount of $47,686.79. The hearing went well, but exposed some regulatory deficiencies that Polizzotto is working on with DHSS.

AAG Rebecca Polizzotto, in conjunction with AAG Don Kitchen of the Medicaid Fraud Control Unit in OSPA, resolved *Navigant Travel Solutions* for the full amount of the audit finding ($123,632.74).

The next case is *Respiratory & Medical Associates.* The state is seeking to recoup Medicaid overpayments in the amount of $39,640.65. Discovery is complete and the section is expecting a briefing schedule to be set by the court during May.

AAG Polizzotto is also working with the Medicaid Audit Committee advising the Office of Program Review, the audit committee and the Division of Health Care Services regarding issues relative to Medicaid audits and how to recoup overpayments. In April, the committee developed an audit selection and audit process for the committee to follow and has began reviewing final audit reports before they are issued to providers for purposes of identifying legal issues associated with the audit findings and the ability of the DHSS to recoup Medicaid overpayments.

Polizzotto has recouped **$162,632.74** pursuant to Medicaid audits in 2006.

Licensing

The section continues to advise DHSS on the implementation of SB 125, which has been intense and will continue to be so as all agencies transition to the new licensing scheme under one administrative division in DHSS. The primary focus now is to finalize the criminal background check regulations.

Labor and State Affairs

Department of Administration, Division of General Services

GCS v. State. GCS's breach of contract claim against the state went to trial this month. On April 7, the court had issued summary judgment on behalf of the state, dismissing most of the claims. Remaining for trial was GCS's claim that the state violated the preliminary injunction that the court issued initially to preserve the status quo.

On April 11, the state moved for reconsideration, asking the court to examine on shortened time whether damages for breach of a preliminary injunction could be awarded to a plaintiff after the plaintiff has lost all of the claims underlying the injunction. The court declined to consider the motion on an expedited basis, and the case proceeded to trial in Fairbanks on April 17.

After a week-long bench trial, the court found a willful violation of the preliminary injunction and tentatively awarded approximately $235,000 in damages against the state. The loss is tentative because the court apparently granted the state's

motion for reconsideration—the court has ordered additional briefing on the issue whether damages can be awarded for a violation of a preliminary injunction if the underlying claims have failed. This case is being handled by AAG Bill Milks, AAG Margie Vandor, and AA Terri Begley-Allen.

Retirement & Benefits

In the Matter of Larry Nelson. On March 28, the Office of Administrative Hearings affirmed the administrator's decision denying this request for occupational disability benefits on the basis that the claimant did not timely file his application under AS 39.35.410(f) (requiring a claim within 90 days of termination of employment, unless the employee can demonstrate "extraordinary circumstances" that would excuse the delay). The ALJ found that the claimant failed to provide evidence justifying a one-year delay. AAG Toby Steinberger represented the state in this case.

Labor and Workforce Development

Employment Security. On April 13, the Associated Builders & Contractors (ABC) filed suit against the state Department of Labor and Workforce Development in Anchorage Superior Court to enjoin the award of STEP grants. STEP is the Statewide Training and Employment Program, which has as its goal the reduction of unemployment insurance claims and which provides grants to train workers for job openings. ABC claims that the program is improperly steering grants to union apprenticeship programs. Judge Rindner denied ABC's motion for decision on shortened time. This case is being handled by AAG Larry McKinstry.

Occupational Safety and Health

Four hearings were scheduled for hearing this month. Three settled and a fourth was heard by the review board. A fifth Juneau case also settled. AAG Larry McKinstry represented the state.

AKOSH v Rainproof Roofing, Inc. This employer was involved in several OSH citations. The one that is pending before the review board involved a failure of the company to enforce the use of personal fall protection by two roofers. A second case arose from the fall of a worker after a safety monitor turned his back. The company was cited for violation of the safety monitor responsibilities; failure to have an adequate warning line and for failing to maintain adequate certified training records. The second case settled, with the company paying a penalty of $3,000. A third case involved safety citations for failing to provide adequate forklift training and for failing to provide fire extinguisher training. The company accepted the violations and agreed to pay a fine of $1,300.

AKOSH v. UIC. This employer was cited for failure to comply with the requirement to notify OSH within eight hours after an injured employee is hospitalized. An employee of UIC (a sister corporation to Rainproof) was seriously injured when a mobile scaffold he was working from tipped over. The employee was evacuated from a clinic in Kotzebue to Anchorage for surgery. The company did not notify OSHA until the afternoon of the next day. The company accepted the citation and the fine of $2,250.

AKOSH v. Trucano. This construction case involved the death of an employee who fell over 20 feet to a concrete surface after improperly using a ladder to span the expanse between two walls and then using the ladder as a platform. The ladder slipped and the worker fell to his death. The company agreed to pay a fine of $4,200 and provide certified training for all employees on fall protection and use of ladders.

Elections

On April 18, AAG Sarah Felix argued before the Alaska Supreme Court in *Kohlhaas v. State* on the issue whether the Lieutenant Governor properly denied an application to certify an initiative for Alaska to become an independent nation.

On April 19, in *Alaskans for Efficient Government v. State*, Brenda Page argued a similar denial of certification of an initiative application. This initiative proposed to impose a legislative supermajority or require voter approval before taxation legislation could be enacted. The initiative applicants objected to preelection consideration of constitutional or any other defects in the initiatives. The state's argument in both of these elections cases was that the subjects of the proposed initiatives were improper subjects for an initiative. Because the defect was a subject matter defect, preelection review was proper.

Motor Vehicles

In *Farnham v. State*, Larry Farnham argued that the DMV should not have revoked his driver's license for drunk driving because a compelling reason necessitated his driving—he had to take a child who was having an asthma attack to the hospital. The state argued both that there were reasonable alternatives to Farnham's driving and that there is no necessity defense in a license revocation hearing. On April 24, 2006, the Superior Court in Fairbanks issued a decision, holding that the necessity defense is not available in administrative license revocation proceedings. AAG Margaret Paton-Walsh represented the state.

Workers' Compensation

O'Bryan v Lisankie, et al. Judge Week's issued a decision in this case in which the plaintiff sought disclosure of the names, addresses and telephone numbers contained in Report of Injury forms filed with the Division of Workers' Compensation. The court granted plaintiff's motion, and denied the state's motion, for summary judgment. It considered the state's argument that AS 23.30.107(c) (which prohibits the division from assembling "individual records for commercial purposes"), but concluded that the subsection was inapplicable and required the agency to disclose the information. AAG Larry McKinstry represented the state in this case.

Special thanks. To Bill Milks, Margie Vandor, and Terri Begley-Allen for their hard work on the one-week trial in *GCS v. State* and to Larry McKinstry for his work with the Division of Labor Standards and Safety in reducing the backlog of Occupational Health and Safety cases.

Legislation & Regulations

During April 2006, the Legislation and Regulations section spent an active month editing draft legislation and bill amendments for the 2006 legislative session. The section assigned legislation to assistant attorneys general for review. The section edited bill reviews for the 2006 legislative session.

The section also performed legal reviews of several regulations projects including (1) Board of Game (permit for selling skins/skulls and sealing of bear skins/skulls; use and taking of game in Arctic and Western Regions); (2) State Board of Education and Early Development (procedural requirements relating to the burden of proof in special education due process hearings; highly qualified teachers; English language proficiency standards; Alaska history proficiency standards; effective date of qualification requirements for paraprofessionals; standards based assessments); (3) Board of Fisheries (Southeastern Alaska and Eastern Gulf of Alaska areas - misc. shellfish, dungeoness crab, shrimp, and groundfish fisheries; commercial and sport finfish fisheries; Aleutian Island District Pacific Cod Fishery Management Plan; miscellaneous subsistence, personal use, sport, and commercial finfish fisheries); (4) Department of Health and Social Services (professional certification of prosthetics and orthodics providers under Medicaid; Medicaid exclusions and drug coverage); (5) Board of Chiropractic Examiners (unprofessional conduct; continuing education application and examination); (6) Board of Pharmacy (license renewal and reinstatement of an expired pharmacist or pharmacy technician license); (7) State Medical Board (cooperative practice agreement between physicians and pharmacists); (8) Board of Nursing (application for examination and unprofessional conduct); (9) Board of Dental Examiners

(licensure by credentials; inspection of dental radiological equipment; forms); (10) Department of Commerce, Community, and Economic Development (fees for pharmacists, technicians, pharmacies, and whole drug wholesale drug distributors fees; fisheries revitalization and Southeast Alaska sustainable salmon fund matching grants); (11) Division of Elections (ballots, absentee voting, and local elections); and (12) Alaska Student Loan Corporation (student loan interest rates).

Natural Resources

City of St. Paul v. State, DNR. On April 21, the section received a favorable opinion from the Alaska Supreme Court in *City of St. Paul v. State, DNR*, an appeal from a tidelands conveyance under AS 38.05.825. The City of St. Paul had challenged DNR's decision to require a survey of the current mean high water line to demarcate the conveyance, arguing that DNR was usurping a judicial function by adjudicating a boundary dispute between the City and Tanadqusix Corp., the adjacent upland landowner.

The court agreed with DNR that the decision did not constitute a boundary adjudication and held that, under AS 38.05.825, DNR "had no need to be more precise" than using the current MHWL to enclose the survey. The court also held that DNR's decision would not affect the rights of either the city or TDX to dispute the boundary, based on the possibility of artificial fill being deposited on the tidelands, in the future. AAG John Baker represented DNR in this case.

Roadless Rule: *California, New Mexico, et al. v. U.S. Dept. Agriculture, et al.* In 2001, the Clinton administration pushed through a final rule prohibiting construction or reconstruction of roads and the harvest of timber in some 58 million acres of inventoried roadless areas in the national forests across the country (the "Roadless Rule"). Over one quarter of the area affected, 14.7 million acres, is contained in the two national forests of Alaska: the Chugach and the Tongass. The Roadless rule was challenged in nine separate lawsuits, and Alaska was among the plaintiffs. Alaska was subsequently able to settle its suit when the USDA agreed to initiate a process to enact a regulation that would temporarily exempt the Tongass from the application of the Roadless Rule until the completion of a rulemaking process for a permanent amendment intended to exempt both the Tongass and Chugach from its application.

After the Alaska settlement, the Wyoming District Court found the Roadless Rule invalid and permanently enjoined it. While that decision was on appeal, the USDA promulgated a new rule, which requires that the national forests be managed under the existing National Forest Management Act, but allows for individual states to petition the USDA to promulgate individualized, specific rules related to the national forest lands within their state (the "State Petitions Rule"). Two consolidated cases, *California, et al. v. USDA* and *The Wilderness Society, et al. v. U.S. Forest Service*, have been brought by four states and multiple environmental plaintiffs challenging the validity of this new rule on the grounds that its promulgation violated NEPA, the Administrative Procedures Act, and the Endangered Species Act. Plaintiffs' moved for summary judgment.

On April 7, AAG Colleen Moore filed an amicus curiae brief in support of the USDA and other defendants, defending the State Petitions Rule. We argued that the State Petitions Rule is valid because it is primarily procedural, simply endorsing management of the national forests under the existing forest management plan, which itself requires NEPA and ESA analysis before significant action can be taken on national forest lands. Additionally, we showed the California court that the Roadless Rule itself was not a valid rule, and was a "one-size-fits-all" approach that did not fit Alaska or other places. We also argued that even if the State Petitions Rule is invalidated, the Roadless Rule should not be reinstated or, if it is reinstated, it must contain the exemption for the Tongass that was promulgated before it was found invalid. Plaintiffs' reply briefs (and opposition to cross-motion for summary judgment) are due May 5,

2006, and the defendants' reply to the cross-motion is due June 2, 2006.

NRS Section Opposing Last Minute Motion for Preliminary Injunction Filed Against PWS Salmon Management Plans. At its meeting December 1-6, 2005, in Valdez, the Alaska Board of Fisheries, adopted a new Prince William Sound Management and Salmon Enhancement Allocation Plan to resolve longstanding allocation disputes between commercial fisheries.

The board also adopted an amendment to the Copper River King Salmon Management Plan to limit openings inside the Barrier Islands near the mouth of the Copper River during the first two weeks of the season and allow additional Chinook to escape the commercial fishery for the benefit of upriver users and conservation of early run stocks.

On April 24, 2006, Cordova District Fishermen United filed a Complaint and Motion for Expedited Consideration seeking a preliminary injunction against both plans. AAG Steven Daugherty is working with the board and the Department of Fish and Game as well as numerous personal use, subsistence, and commercial user groups to prevent an injunction. The case is complicated by a failure of the board's recording equipment; after forensic enhancement of the recordings it appears that the transcript will still have numerous gaps. AAG Daugherty is also working with the board to develop findings to support its regulatory actions.

Supreme Court Invalidates Chignik Cooperative Fishery Regulation. In a decision dated April 21, 2006, the Alaska Supreme Court issued its opinion in *State v. Grunert*, holding that the Board of Fisheries' emergency regulation authorizing a cooperative commercial salmon fishery in Chignik for the 2005 season was invalid because it was fundamentally inconsistent with the Limited Entry Act in that, even though permit holders were all required to actively participate in the fishery, it allowed permit holders in the cooperative to benefit economically from the work of others.

The board adopted the emergency regulation after the original co-op regulation was invalidated in *Grunert v. State*, 109 P.3d 924 (Alaska 2005). The court also held that the co-op regulation interfered with the Commercial Fishery Entry Commission's ability to determine the optimum number of permits per fishery. As in the 2005 opinion, the majority decision did not acknowledge or address a provision in the Limited Entry Act that states nothing in it "limits the power of the Board of Fisheries." AS 16.43.950.

The court also held that the co-op regulation illegally allocated fishery resources within a single fishery, rejecting the argument that the use of different gear (fixed leads) and methodology in the cooperative fishery created a separate fishery in this long-standing purse seine fishery.

In the board's favor, the court held that the emergency co-op regulation did not require illegal "pledging" of permits under AS 16.43.150(g).

The board had conditionally adopted a permanent regulation to take effect in the 2006 season, but it repealed the new regulation in March after receiving a preliminary order from the court in this case. A similar cooperative fishery for the Nunivak Island herring fishery was also repealed at the same time. The section will be reviewing other regulations for potential problems as well. The board was represented by AAG Lance Nelson.

Mottet v. DNR. In June, 2004, DNR terminated Madelon Mottet's aquatic farmsite lease in Sitka on the grounds that she failed to achieve commercial use of her site by selling at least $15,000 worth of aquatic farm products by the end of the fifth year of her lease. She appealed to the commissioner, claiming that she did achieve commercial use because she exchanged equipment for the rights to future abalone or, if she did not achieve commercial use, such failure

was for reasons beyond her reasonable ability to foresee or control.

Specifically, she argued that she had slow growing oyster seed, that she did not get necessary acquisition permits from ADF&G because it was backlogged, and that her new Canadian husband was kept out of the country because of a lengthy visa process. The commissioner upheld the termination and Mottet filed an administrative appeal in the Sitka Superior Court. The state's Appellee's Brief was filed in Sitka on April 25. AAG Colleen Moore represents DNR in this matter.

Ostrow v. DNR. In May, 2005, the Division of Mining, Land, and Water in Fairbanks issued a decision finding that Ostrow or her successor, Western Investments, Inc., had physically blocked a valid existing RS 2477 trail known as RST 278 or the Fairbanks-Chena Hot Springs trail. It ordered Ostrow to remove the obstructions and notified her that if she did not remove the obstructions, then the division would remove them and charge her for the cost.

The record of survey done by the division depicted the width of the trail as 60 feet. Ostrow appealed to the commissioner, who upheld the division's decision, and indicated that the width of the trail affected was 100 feet. Ostrow has appealed to the superior court, claiming that there is insufficient basis for a determination that the trail is either 60 or 100 feet wide, that its use should be limited to seasonal, winter use, and that the use of the trail should be precluded because there is a paved, maintained highway (Chena Hot Springs Road) that has supplanted the trail.

Ostrow has asked that the case be remanded to the agency for additional decision and argument on the issue of the width of the trail, and we are considering stipulating to a limited remand. AAG Colleen Moore represents DNR in this appeal.

DNR, Division of Agriculture. AAG Sabrina Fernandez attended the April meeting of the Board of Agriculture and Conservation and a shareholder meeting for Matanuska Maid Inc. where it was reported that the dairy will operate at a loss for the first time in many years due to new federal food safety requirements.

The Supreme Court granted the state's motion to dismiss an appeal filed by Dana Olson challenging an agricultural land sale outside of Fairbanks.

Bill Review (HB 251). AAG Stan Fields completed a Bill Review for CSHB 251(RES) on March 29, 2006. CSHB 251 (RES) authorizes the Board of Fisheries to adopt a regulation to allow persons holding two entry permits for a salmon fishery an additional opportunity to participate in that particular fishery. This would be interpreted to include fishing with additional or modified gear, at additional times or areas, or under other conditions that the board considers appropriate.

These specific measures were included in an earlier version of the bill, but were replaced with more general language. Committee discussion at the time of the change indicated that the intent was to streamline the language rather than to narrow the board's authority. The bill also creates an exception to AS 16.43.140(c)(5), which prohibits persons holding two permits from fishing under a second permit.

Regulations Review (20 AAC 05.220). AAG Stan Fields completed review of a regulations package that amends 20 AAC 05.220 on April 25, 2006. A portion of the amendments are in response to action by the Board of Fisheries, and adds the use of pot gear for sablefish under certain Gear Codes. The new regulations also establish a new Gear Code for harvesting wild stock of a species identified for culture in an aquatic farming operations permit to be harvested from a farm site.

Opinions, Appeals and Ethics

Ethics

For ethics matters, most of the work we do and advice we give is confidential by law. However, we can report that we provided advice during April to a former state employee and a retiring employee about the Ethics Act's restrictions on employment after leaving state service. We also closed two preliminary investigations of ethics matters that came to our attention through designated ethics supervisors' quarterly ethics reports. In addition to work on other confidential ethics matters during April, we continued to monitor bills proposing changes to the Ethics Act.

Appeals

Nicole H. v. State, DHSS, OCS. The Alaska Supreme Court issued a decision in an appeal handled by AAG Mike Hotchkin. In *Nicole H. v. State, DHSS, OCS*, the Alaska Supreme Court upheld the trial court's order terminating a mother's parental rights. The mother had argued that the state Office of Children's Services should have provided her with psychological services in addition to helping her address her alcohol addiction.

The supreme court held that OCS's efforts regarding substance abuse were adequate, and that it made appropriate efforts regarding the mother's mental health when her mental health became an issue. The court also stated that at a termination trial the trial court must review OCS's efforts to reunify the family during the entire history of the case, even if, at preliminary proceedings, the court entered unchallenged findings that OCS has been making sufficient efforts. The supreme court stated, however, that the trial court is entitled "to treat its earlier findings as being at least presumptively binding," as long as the court does not prevent the parent from presenting "evidence covering the entire history" of the case.

Debbie G. v. State, DHSS, OCS; Charles F. v. State, DHSS, OCS. The Alaska Supreme Court also issued an opinion in an appeal handled by AAG Megan Webb, *Debbie G. v. State, DHSS, OCS; Charles F. v. State, DHSS, OCS*. The court affirmed the termination of parental rights of both parents to their son. The court rejected the parents' argument that because they had designated a relative to care for their son, they had remedied the conduct or conditions that placed him at risk. The court concluded that, under AS 47.10.088(a), the focus is on freeing a child for adoption or permanent placement and on whether the parents' remedial efforts "remedy the risk posed by returning the child" to them, not to other relatives, and allowing unfit parents to simply designate someone else to care for their child does not ensure a permanent placement.

The court also rejected the father's argument that under AS 47.10.084(c), he should have been allowed to select his son's adoptive placement prior to the termination of his parental rights. In doing so, it noted that this statutory provision only permitted parents who retain their parental right to veto an adoption; it "does not give parents an affirmative legal right to require the state to permit a particular adoption."

In re Adoption of Missy M. and Cameron H. The Alaska Supreme Court also issued an opinion in another of Megan Webb's cases, *In re Adoption of Missy M. and Cameron H.* This case involved two petitions to adopt children, who were in OCS' legal custody. OCS withheld its consent to the petitions since the adoptive parents had relinquished their foster care license after OCS substantiated a report of abuse and relinquishment of the license precluded OCS from placing the children in this home. The trial court had granted the petitions to adopt, finding that OCS unreasonably withheld its consent and that the adoptions were in the children's best interests. Concluding that the trial court applied an incorrect legal standard, the supreme court vacated the orders granting the petitions for adoption and remanded for further proceedings.

At those proceedings, the trial court must determine whether the adoptive parents can demonstrate, by clear and convincing evidence, that it would be a clear detriment to the children to deny the petitions to adopt. In doing so, it may consider current factual circumstances, including the effect of removing these children from this home given the passage of time since the petitions were granted and whether the adoptive parents still engage in the conduct substantiated in the prior reports of harm.

Regulatory Affairs & Public Advocacy (RAPA)

Stipulated Settlements

U-05-54, Enstar billing practices. Just prior to hearing, RAPA entered into a Stipulation and Settlement Agreement with Enstar Natural Gas Co. that assures continued commission jurisdiction and oversight of the utility's third-party vendor billing practice for credit card payment of gas bills. The fundamental issue in the case is whether a utility can outsource an integral area of historically regulated service (billing and collection) to a third party whose rates and services are claimed to be beyond the jurisdiction of the Regulatory Commission of Alaska (RCA).

Enstar sought to permanently outsource the processing of credit card payment of its gas bills to a for-profit vendor ("EPOS") who directly charges ratepayers a 'convenience fee' for its services. Historically, costs associated with utility billing and collection have been included within a utility's revenue requirement which is subject to the commission's review for reasonableness as part of a conventional rate case. The utility claimed that the third-party vendor's charges were not subject to commission jurisdiction and oversight. RAPA's pre-filed testimony challenged that proposition. On the eve of trial, the parties negotiated a settlement.

As a result, the arrangement with EPOS will be described in the utility's tariff, Enstar will notify the RCA (and the attorney general) in writing of any proposed fee increases to ratepayers for credit card payment of gas bills, the RCA will have the right to review all proposed fee changes for reasonableness and any new contract for third-party credit/debit card payment services must be submitted to the RCA for approval. The stipulated settlement was filed with the commission for its approval on April 12, 2006.

U-05-90, AEL&P rate case. RAPA and Alaska Electric Light & Power (AEL&P) entered into a Stipulated Settlement on April 12, 2006 resolving a rate case filing by this investor-owned electric utility providing service in Juneau/Douglas and to the Kennecott Greens Creek Mine on Admiralty Island. Another party in the proceeding, AARP, will proceed to hearing with the utility on an issue related to the mine contract.

RAPA's settlement resolves all disputed issues with respect to AEL&P's revenue requirement for the purpose of permanently reducing the utility's requested rate increase from 5% to 4%, the amount approved by the commission on an interim basis. In particular, the utility agreed to reduce its requested return on equity from 14% to 13%, agreed to RAPA's recommended $50,000 reduction in revenue requirement, agreed to submit any new credit card payment processing agreement to the RCA for its review and approval, and agreed to file a cost allocation manual and depreciation study to be used in its next rate case. The parties await commission action on the filed settlement.

RAPA Intervention Summary Update. As of April 18, 2006, RAPA is involved in eighteen dockets before the RCA. That number includes sixteen adjudicatory matters in which the attorney general/public advocate has elected to participate as a party and two rulemaking proceedings in which RAPA has offered formal comments.

Torts and Workers' Compensation

Workers' Compensation Decision. AAG Patti Shake represented the State of Alaska, Department of Health and Social Services in a

workers' compensation case that went to hearing on March 2, 2006. The employee claimed he suffered from a mental illness as a result of mental stress arising from his physical assault of a client at work, and thus was entitled to receive time loss benefits, medical costs including mental health counseling, and prescription medications. The employee alleged that he felt threatened by the client, and reacted by grabbing the client by the throat and pushing him against the door. The employee failed to disclose his prior mental health problems which predated the work incident.

The state controverted the employee's entitlement to benefits on the grounds he had not suffered a compensable mental injury or illness arising out of or in the course of his employment. In addition, the state asserted the employee's claim for benefits was barred under AS 23.30.110(c) because he failed to timely request a hearing within two years of the date of the state's post claim controversion.

The Alaska Workers' Compensation Board ruled in favor of the State of Alaska denying and dismissing the employee's claims. They found that the claims were time barred under AS 23.30.110(c), and further ruled that even if the claims were not time barred, the claimant was unable to prove the compensability of his mental conditions by a preponderance of the evidence.

Summary Judgment Awarded to the State in case alleging ADA violations. Senior AAG Susan Cox successfully obtained summary judgment in favor of the state in a personal injury case filed by a young Petersburg fisherman who fell on a ramp to the Juneau Aurora Boat Harbor in April 2002. The plaintiff contended that the ramp, which was installed in the 1960's, was negligently designed and constructed, violated the Uniform Building Code, and did not meet requirements of Title II of the Americans with Disabilities Act. Most of the plaintiff's allegations against the state focused on the size of the ramp's handrail – made of 1 ½" standard pipe, it measures 1.9" in diameter – and the steepness of the 55' ramp at low tide. Superior Court Judge Patricia Collins agreed with the state that claims about the ramp's original design and construction could not be brought because the ramp was built more than 10 years before the lawsuit was filed. The state had no obligation to rebuild or replace the dock ramp over the years, and cannot be sued for not doing so, under state tort law or Title II of the ADA. The judge also found no genuine dispute about the fact that the Uniform Building Code does not apply to dock facilities, or that the handrail complied with the size requirements of ADA guidelines. Additionally, because ADA guidelines about permissible slopes for dock ramps were not adopted until after the plaintiff's accident, they cannot form the basis of a liability claim.

The judge acknowledged that theories of negligent maintenance of the ramp surface or failure to install appropriate non-skid surfacing when the ramp decking was replaced by the harbor manager, the City and Borough of Juneau (CBJ), would not be resolved by summary judgment. Similarly, issues about whether the harbormaster adequately advised the plaintiff's skipper of ADA-accessible alternatives are fact questions for the jury to decide. Because these issues pertain solely to the CBJ's operation and management of the harbor under contract to the state, the state has tendered its defense to the CBJ's legal team and insurers. The CBJ is already a co-defendant in this case.

Pending Summary Judgment Motions in §1983 case. Police officers represented by Senior AAG Venable Vermont Jr. opposed an inmate's motion for summary judgment and cross-moved for summary judgment based upon qualified immunity in a civil rights case brought by a former inmate whose conviction for drugs had been overturned by the Alaska Court of Appeals. That court found that the trial court should have granted the inmate's suppression motion in the criminal case because the officers did not have the right to be in his motel room at the time they asked him to leave (and saw his drugs and paraphernalia as he gathered them up to go). The Court of Appeals found a constitutional violation stemming

from the motel seizure of drugs and paraphernalia.

The former inmate, now as plaintiff, brought a civil suit for damages, and moved for summary judgment based upon res judicata and collateral estoppel doctrines. The officers, arguing that these doctrines do not apply because the officers are not in privity with the state in the criminal prosecution, opposed the inmate's summary judgment motion. The officers cross-moved for summary judgment arguing that the officers could have reasonably believed that they had a right to be in the room based on their conversations with the desk clerk. Their argument of their reasonable belief is buttressed by the fact that the trial judge reached the same conclusion after a day long suppression hearing with witnesses, oral argument, and written motion work. The case is pending before Judge Beistline in federal court in Fairbanks.

Pending Petitions for Review. One case pending in the trial courts in Fairbanks has generated two Petitions for Review filed by AAGs Gene Gustafson and Megan Webb (an AAG in the Opinions, Appeals, and Ethics section) seeking interlocutory review of two trial court rulings. The first petition seeks review of the trial court's ruling that although a social worker was entitled to qualified immunity for an alleged violation under 42 USC §1983, the qualified immunity under federal law was defeated by plaintiffs' allegations of bad faith. The petition argues that the trial court erred in denying the protections afforded by the qualified immunity doctrine to the social worker because the trial court mistakenly relied upon state common law, where allegations of malice may defeat official immunity, rather than on federal § 1983 law, where allegations of malice are irrelevant.

The second petition, argues that the trial court erred in finding that a social worker who is subsequently sued for damages in a civil action is precluded from litigating findings of fact and conclusions of law entered in a termination of parental rights proceeding. The petition asserts that because social workers are not parties in a parental termination trial, the doctrines of issue preclusion or collateral estoppel are inapplicable against them. Additionally, findings made in the parental termination trial should not be given preclusive effect against the state in a civil action for damages. Granting preclusive effect to the findings effectively denied all defendants their constitutionally guaranteed due process rights.

The Supreme Court has not yet decided whether to accept the petitions.

Transportation

Iliamna to Nondalton road project lawsuit dismissed. Judge Gleason issued a favorable decision in a state court action brought by Bob Gillam and the Alaska State Council of Trout Unlimited challenging the construction of a road link between Iliamna and Nondalton. DOT&PF seeks to repair approximately nine miles of an existing dirt road from Iliamna to the Newhalen River, to construct a one-lane bridge over the river, and to build three miles of connecting road over an existing all terrain vehicle trail to the village of Nondalton. The court previously granted two motions for partial summary judgment in favor of DOT&PF. Judge Gleason has now dismissed the remaining counts in the state court action. AAG Susan Urig represented DOT&PF in this case. Two federal suits challenging the same project are pending.

Kotzebue Water project case against DOT&PF dismissed. DOT&PF was dismissed from a lawsuit challenging the procurement of a contractor to construct a drinking water improvement in Kotzebue. The court ruled DOT&PF did not have a duty to administer a bid for a construction contract when the contract was to be financed by a grant from the DEC Village Safe Water program. AAG Joan Wilson represented DOT&PF.

Psenak denied rehearing. The Alaska Supreme Court denied a petition for rehearing filed by Jim Psenak Construction. The Supreme Court had

previously issued a decision favorable to the state in this construction case. AAG Jeff Stark represented the state before the Supreme Court.

Convention Center land transaction closed. The state sold a block of land near the Atwood building to allow the Municipality of Anchorage to construct a convention center. In exchange, the state received a half-block of equivalent land near the Atwood building, $2.31 million, and the rights to parking spaces, for seven years, in the Penneys Garage. AAG Jeff Stark and Chief AAG Jim Cantor helped negotiate and draft the terms of this transaction.

Fairbanks condemnations completed. The transportation section's Fairbanks office obtained final judgments in three condemnation cases. One case involved Old Richardson Highway improvements; one involved upgrades to Airport Way Frontage Road; and one involved a project to improve streets and drainage in south Fairbanks. AAG Leone Hatch completed these condemnations.

CRIMINAL DIVISION

Anchorage DAO

Leroy Lopez sentenced to 60 years for killing Taco Bell worker during robbery. On April 4, 2006, Leroy Lopez was sentenced to 60 years in jail for the second-degree murder of Josh Goliver during a 2003 robbery of a Taco Bell on east Fifth Avenue in Anchorage.

On Aug. 16, 2003, Leroy Lopez shot and killed a 21-year-old employee of the Taco Bell Boulevard during a robbery. The employee was working at the drive-through window when Lopez walked up to the window, pointed a gun through the window, got money from him, and then shot him.

There were two other men involved in the robbery. One, Leon Kinneeveauk was sentenced last summer to 50 years behind bars, with 25 suspended, upon his promise to testify against Lopez. The case against the third robber, John Teri, who had been employer by Taco Bell beforehand, is still pending.

At sentencing, Judge Stephanie Joannides asked Lopez, "Anything you want to say? You don't have to say anything but if you do want to say anything, this is your opportunity." Lopez said, "I have nothing to say." ADA John Skidmore handled the sentencing for the state.

Long-time misdemeanant, Oscar Cano, convicted of felony attempted sexual assault. On May 16, 2002, two rollerbladers on a bike trail near Cal Worthington Ford saw two men having sexual intercourse with a woman behind the business and, when the rollerbladers reported that to Cal Worthington employees, two of them walked back to the area to investigate. They saw the victim on the ground and Oscar Cano standing near her, pulling up his pants. The woman appeared intoxicated and helpless.

When police arrived, three men were holding Cano for them. One of the men was a relative of the victim who had come to help her, arriving in time to see Cano pulling up his pants, too. Police found the victim unresponsive, naked from the waist down.

The defendant elected a non-jury trial before Judge Michael Wolverton. The trial took place over four weeks from March 13 to April 4. The judge found Cano guilty of attempted sexual assault in the second degree.

Cano has 18 prior misdemeanor convictions starting in 1977. He is the Cano of *Cano v. Anchorage*, 627 P.2d 660 (Alaska App. 1981), holding that a defendant defending *pro se* may have a lawyer with him with whom to "consult" during the trial. ADA Alan Goodwin tried the case for the state.

Jerry Daniel McClain pled to murder in the first degree, open sentencing. On April 10, 2006,

Jerry Daniel McClain, age 30, entered a plea of no contest to one count of murder in the first degree in the death of Kiva Friedman, age 35. The plea was entered before Judge Michael Wolverton. Sentencing was set for September 12, 2006.

McClain was charged with the murder, assault, kidnapping and sexual assault of Kiva Friedman on April 26, 2003. At about 7:17 a.m., that day McClain telephoned 911 and said, "I do have an emergency here. I killed my girlfriend last night." When the dispatcher asked him how he killed her, McClain said, "I beat her up with a baseball bat."

Police arrived to find McClain outside the house, with blood on his hands and a hair, later identified as Friedman's, in the blood on his hands. Inside the apartment they found Kiva Friedman, dead, and a wooden Louisville Slugger baseball bat in a closet with blood on it.

McClain had invited three people, including his brother, over to his house after he had tied up and beaten Ms. Friedman. McClain's brother told police that McClain had telephoned him about 4:00 a.m. and asked him to come over. When he arrived, the brother found the body of Ms. Friedman bound, her hair cut off, and bloody from a beating. McClain played for his brother a voicemail message from the telephone. In the message, a male voice left a message for Ms. Friedman explaining that he had found a boyfriend for her and that she should erase this message because McClain would become upset if he heard it. The brother said the message upset McClain.

McClain had invited two other friends over to show what he had done. They both told police they had arrived to find the victim naked, tied up, and beaten, lying on the floor. And McClain told them he had done it.
McClain's trial was scheduled to begin April 17, 2006. That day, McClain plead to murder in the first degree, open sentencing. The sentencing range is 20-99 years. But the state has alleged that this murder involved torture and, as such, is subject to a mandatory minimum of 99 years in jail. If the state is able to prove torture by clear and convincing evidence, the judge is required to sentence McClain to a mandatory 99 years in jail, with no eligibility for parole, not just authorized to impose a 99-year sentence under which there is parole eligibility after 33 years.

The evidentiary hearing on the torture is scheduled for May 2 through May 4, 2006. McClain will then be sentenced on September 12, 2006. Chief Assistant District Attorney John Novak was the prosecutor on the case and will handle the two phases of the sentencing.

Antonio Garrison pleads to two second-degree murders for killing a car dealer and for killing his girlfriend. On November 11, 2000, Antonio Garrison shot and killed Paul Clinton in Clinton's office at a used car dealership in Anchorage. In trying to identify his killer, police learned that Antonio Garrison had a business deal under which he stood to get $40,000 if Clinton were dead.

Police interviewed Garrison and he admitted having been in the office and finding Clinton dead. While denying that he had shot Clinton, he did admit having picked up and removed from the scene a handgun apparently used to shoot Clinton. Garrison explained that he was a convicted felon and he was sure the evidence would tie him to the handgun and get him charged as a felon-in-possession, so he took the handgun, even though he had not been the person who killed Clinton. He said he had given the gun to his brother, but, when police recovered a gun his brother identified as one he had gotten from Garrison, it was not the murder weapon. The grand jury indicted Garrison on that evidence.

While that investigation was going on, Antonio Garrison killed his girlfriend, Tawni Williams on May 18, 2001. Williams had disappeared and police began to look for her. They found that her boyfriend, Garrison, had cashed her Cook Inlet Regional Corporation check and had been withdrawing money from her bank account after

she disappeared. He had also sold a trailer belonging to her—after she disappeared.

A friend of Garrison, Curtis Kragero, told police that he had been with Garrison when he killed Williams and had helped bury her body on property belonging to Garrison's sister located in the Point MacKenzie area, across Knik Arm from downtown Anchorage. Police found Williams body in a grave on the sister's property.

Though Garrison was charged in 2001, both cases were still pending trial as of 2006. Judge Michael Wolverton had suppressed Garrison's statement in the Paul Clinton case, but the Alaska Court of Appeals reversed. Facing the admissibility of the statement and the two trials, Garrison entered into a plea agreement under which he plead to murder in the second degree for the killings of both Paul Clinton and Tawni Williams. There was a sentence agreement under which Garrison, age 42, will be sentenced to 21 years in each case, consecutive, with his parole eligibility denied until he has served 28 years. Chief ADA John Novak negotiated the plea and will handle the sentencing.

Soldotna man convicted of sexual assault of a minor for attack on 13-year-old walking home from the mall. On June 16, 2004, a 13-year-old girl and her companions, ages 12 and 14, were walking through a wooded area of Soldotna between the Soldotna Mall and their adjacent residential neighborhood. In the woods, they met a man who told them he was "Brian Cooper." Brian Cooper offered them cigarettes and then tried to fondle or kiss the 13-year-old and her 14-year-old friend, but the 12-year-old disrupted the events by announcing that the three had to leave because parents were expecting them to "go home."

All three got up to leave the wooded area and all started to walk out. Brian Cooper held the 13-year-old back and then dragged her to a more secluded spot out of the view of her departing friends. The friends did not notice that the 13-year-old was not with them until they got out of the woods. By then, they could not see the 13-year-old anywhere. They went back into the woods and came upon the 13-year-old. She was crying and pulling up her pants. She walked quickly past her friends and out of the woods, while "Brian Cooper" said, "Don't you guys want a cigarette?" While with the 13-year-old, Cooper had put his finger in her vagina and her anus.

The girl and her two friends immediately reported their observations to Soldotna Police. But it took a month to find "Brian Cooper" and to put his photograph in a line-up. On July 20, the 13-year-old victim and the 14-year-old positively identified Brian Cooper from a photographic lineup from a high school yearbook photo.

On April 20, a Kenai jury convicted Cooper of sexual abuse of a minor in the first and second degrees. ADA Adrienne Bachman traveled from Anchorage to Kenai to try the case.

Fairbanks DAO

April did not see any more apparent heart attacks caused by the intense questioning of ADAs Darren Watts and Matt Christian. The month did see the late arrival of spring and with it 70 referrals for driving under the influence. Of the referrals for April, 62 were for misdemeanor driving under the influence (DUI) and eight were for felony DUI.

One felony DUI defendant is now back for his third felony DUI since 2003. The second conviction in 2003 occurred after he was caught about 200 miles outside his third party custodian's custody. April also saw the usual number of other misdemeanor crimes.

The grand jury returned 45 indictments during April. Two individuals were indicted for robbery in the first degree and several individuals were indicted for misconduct involving controlled substance in the third degree.

One of the individuals indicted for misconduct involving a controlled substance in the third degree has learned something from his prior conviction. The defendant had been released pending appeal after having been convicted of misconduct involving weapons II and misconduct involving controlled substance III. As a condition of his bail pending appeal he had to submit to a search for drugs. He was stopped after officers observed a traffic violation. The cell phone conversation he was having at the time of the violation may have contributed to the traffic violation. He consented to a canine sniff of the exterior of the vehicle he was driving. Officers then found approximately 26 grams of crack cocaine. He did not have a firearm to protect his drugs on this occasion.

For the second month in a row, a violent crime occurred in the vicinity of the Fairbanks Office. This month, an argument and fight between the defendant and the intended victim resulted in an exchange of gun fire in the parking lot of the building. The physical fight between the intended victim and the defendant occurred on Friday night. Early the following Monday morning, the defendant and an accomplice found the intended victim sitting in his car with another individual in the Northward Building parking lot. The defendant and the accomplice opened fire on the intended victim and his vehicle with handguns. The defendant and the accomplice proved to be lousy shots, only hitting sheet metal of the vehicle and a nearby vehicle. The intended victim, after being fired at, returned fire striking both the defendant and accomplice. Both the accomplice and the defendant were taken to the hospital by a passing cab.

Kenai DAO

This has been a month for sex offender trials on the Peninsula, and they all resulted in guilty verdicts.

ADA Adrienne Bachman graciously agreed to try one of the cases, which was a stranger rape with very little physical evidence.

ADA Scot Leaders tried another sexual abuse of a minor in the first degree case soon on the heels of last month's victory. In this case, the report came eight years late. At the time of the crime, the victim was eight years old. Because the defendant was a friend of the victim's babysitter, the exact date of the crime was known: her parents' anniversary. The defendant confessed and did not testify, and the jury found him guilty.

ADA Jean Seaton tried a sexual abuse of a minor in the second degree trial in Homer, which is a difficult place for age-based assaults. Seaton worked the case and got a conviction. A critical fact that appears to have swung the jury was that the victim contracted herpes as a result of the assault, and Seaton called a virologist who gave very convincing testimony on this issue.

ADA Angela Jamieson tried a misdemeanor failure to register case, which took on a life of its own. The trial lasted a week, and thanks to her efforts and those of the staff and officers, she mounted a rebuttal case that had twice as many witnesses as her case in chief. Not only did the jury convict on the failing to register as a sex offender charge, they also convicted him of unsworn falsification for the lies he told on the registration form.

The defense was that he didn't have a home to register because he was living in a motor home and touring around the Peninsula. Jamieson got records from the R.V. park where he were living, credit card receipts to show payments, invoices from work to show that he was in fact working during the period in question, and even realtors to show that he bought a house and moved into it the day that he left the R.V. park. She put in quite a lot of effort and prevailed as a result.

The office received several new felony cases this month. In one week alone three felony DUIs were received. There have been several felony assaults, a vehicle theft, and several drug cases. The grand jury indicted co-defendants on ten burglary counts as well as assorted thefts and

criminal mischiefs. The defendants broke into a series of ten summer homes in a "gated" community in Soldotna and vandalized several of the homes.

The troopers would like to credit great police work for solving the case, but they admit it was just luck. One of the burglars left his cell phone behind. And since he and his co-defendant were just placed on felony probation last month for a series of burglaries, it was pretty easy to link the two of them in this case.

Although it is interesting to see that they learn from their prior mistakes. The last time these two were caught, the police tracked them down by their shoe prints, and they were found still wearing the matching shoes when arrested. This time one of them went to the local Payless Shoe Store and put his size 14 shoes in a trash bin and walked out wearing a brand new pair that he seems to have forgotten to pay for. He even said he did it because it was the shoes that got him caught the last time.

Kodiak DAO

A 21-year-old Kodiak man was sentenced to be placed on probation for four years and given 30 days in jail for fraudulent use of a credit card. This defendant had worked at a local bowling alley, and after saving a credit card receipt for a bowling locker payment, used the credit card numbers to charge minutes on a friend's cell phone service. The defendant was ordered to be evaluated for drug abuse, and to follow all treatment recommendations, including up to 30 days in residential treatment, if recommended.

A 23-year-old Kodiak man was convicted of felony theft and placed on probation for four years after having been found to have taken approximately $1000 worth of electronic gear from a family friend. He was ordered to complete 80 hours of community work service, and to undergo an evaluation for alcohol abuse and to complete any treatment as recommended. Because it had been the specific request of the victim, the court ordered community work service in lieu of any jail time.

Nome DAO

On April 17, sentencing was held for Matthew Owens, the former Nome Police Officer convicted by jury of the murder of Sonya Ivanoff. Prosecutor Richard Svobodny pointed out to Judge Esch that someone convicted of murdering a police officer is required by law to serve 99 years, and argued that an officer who commits murder in the course of his police duties should receive the same. Judge Esch found this persuasive and sentenced Owens to the requested sentence. In the wake of Owens' sentencing, there is now an effort by some in this region to codify this result. Styled "the Sonya Ivanoff law," the proposal would amend sentencing statutes to require that a police officer who commits murder in the course of their official duties would be required to serve 99 years without parole.

Palmer DAO

Kevin Stock was convicted, after a jury trial, of assault in the first degree, assault in the second degree and assault in the third degree. The charges stemmed from an incident where Stock beat a victim with the victim's boot cast. Both men were intoxicated. The victim died of an unrelated drug overdose before the trial. Stock's attorney unsuccessfully argued self-defense, defense of property and defense of home.

After a half hour of deliberation, a Palmer jury convicted Christopher Hewitt of felony driving while intoxicated and driving while license suspended. Hewitt took the stand in the trial and claimed another person was the driver.

Jimmy Connell was convicted, after jury trial, of felony driving while intoxicated, driving while license suspended, reckless driving and misconduct involving weapons in the fourth degree.

A Palmer jury convicted Max C. Schwab of indecent exposure in the second degree. In June of 2004, Schwab exposed his penis to a young female at a Talkeetna campground and stated "Hey baby, what's up?" Schwab was sentenced to serve 360 days, with 270 days suspended, and placed on probation for three years.

After a bench trial, Judge Eric Smith found Carlos Navarro guilty of multiple counts of burglary and theft. Navarro participated in numerous burglaries in the Willow and Sutton area to obtain firearms and jewelry.

Madison Hildebrand, age 18, was sentenced to serve six years, with three years suspended, and to serve five years of probation after being convicted of assault in the second degree. Two people were injured during the stabbing incident and told police that Hildebrand was on drugs at the time.

Richard Horton was indicted on eight counts of sexual abuse of a minor in the first degree and two counts of sexual abuse of a minor in the second degree for sexually abusing his 12-year-old stepdaughter.

In Valdez, Judge Schally sentenced Dominic Winger and Jeffrey "Todd" Kelly. Winger, after pleading no contest to attempted murder, was sentenced to serve seven years, with two years suspended, and to serve five years of probation for stabbing the victim 14 times with a pocket knife. Kelly was sentenced to serve over two years, with additional suspended time and probation, for cashing counterfeit checks at a Valdez bank and probation violations.

Twenty five individuals were indicted on new felony charges by the Palmer grand juries in April.

ADMINISTRATIVE SERVICES DIVISION

ProLaw. The division continues to work with the civil division on reaching an agreement with ProLaw regarding replacement timekeeping and billing, improving case management, and incorporating document management into the civil division's legal practice. Scarce time and resources have slowed the pace of this project.

IT. There are a number of major projects that loom large on the horizon in addition to the ProLaw project. The State continues on its course to reach an enterprise approach to e-mail with Microsoft's Exchange product and to begin talking about standardizing computer network services on Microsoft.

Finance. The fiscal section always appreciates the continued efforts of the various law offices to timely submit invoices or other necessary records to them. They continue to work to approve efficiency and timeliness.

SAVE THE DATE

August 6-10	Conference of Western Attorneys General Summer Meeting - Anchorage